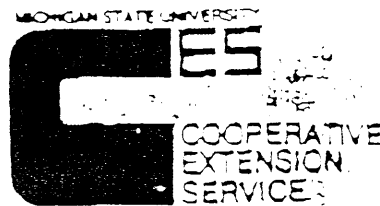


IRRIGATION GUIDE



Cooperative Extension Service
Michigan State University

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LEGAL ASPECTS OF IRRIGATION WATER USE IN MICHIGAN

Water law in Michigan can be a complex and somewhat confusing subject. The complexity stems from the nuances of the riparian doctrine which was handed down from English common law and uses case law to establish water rights. The confusion stems from the lack of a comprehensive official document which outlines water rights and responsibilities for Michigan water users.

Michigan farmers are presently investing in irrigation equipment at the rate of over 20 million dollars per year. In addition, Michigan irrigators are withdrawing over 77.6 billion gallons of water annually. This is equivalent to 28% of the water consumptively used in the state of Michigan (IRRIGATION IN MICHIGAN, 1977).

Practically speaking, most farmers would agree that, without water, water an irrigation system is of little use. Few farmers would build a farm building on a piece of land without some assurance as to the title of the land, yet most irrigators invest thousands of dollars in irrigation systems with very little knowledge of the legal constraints to water use and absolutely no assurance of their legal rights to use of the water for irrigation.

This bulletin has been written as an introduction to the legal aspects of water use for irrigation in the state of Michigan. The Public Acts statutes and Water Laws referred to in this bulletin pertain only to state of Michigan.

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A Bundle of Rights

The ownership of land (property) involves the transfer of many different interests or rights. These rights can be considered individually or taken as a whole. They are often referred to as a "bundle of rights". Included in the "bundle of rights" are such things as the rights to land improvement (development), mineral rights, and water rights.

The majority of these rights are exclusive rather than absolute. For example, though you may be the only one with the legal right to build a porch on your house you may be required to have a building permit to do so. In this case society (i.e. the city, county or state) has redefined what you previously may have considered your absolute right into an exclusive right. Water rights are generally considered exclusive rather than absolute rights. Thus the use of water is subject to the consent of the "sovereign power", in our case, the State and Federal government. This consent can be established by statutes or as in the case of the riparian doctrine by case law.

The Riparian Doctrine

The riparian doctrine was handed down to the American Colonies from English Common Law. For this reason it is the basis for water laws in most states east of the Mississippi River. West of the Mississippi the appropriation doctrine (first in use, first in right) is practiced.

The riparian doctrine states that each land owner whose properties are bound or traversed by a river, lake or stream has the right to the use of the water and have it flow past his lands undiminished in quantity or quality. Along with this doctrine, the "natural flow" rule was also applied. In simple terms, the "natural flow" rule states that riparians have usufructuary, but not proprietary, rights to the water which flows by their land. The "natural flow" rule allowed riparians the rights to the use of the water for the so-called natural uses of domestic cooking, drinking, bathing and live stock watering. These rights extend only to purposes connected to riparian land, therefore, the water cannot be transferred for use on non-riparian land.

In most eastern states the "natural flow" rule has been replaced by the "reasonable use" rule. This rule broadens the uses of riparian water to so-called "extraordinary or artificial" uses such as recreational, municipal, industrial or agricultural (irrigation). With this modification riparian waters can be diminished for extraordinary uses as long as the "natural" needs of other riparians can still be met. In Michigan recreational, municipal, industrial and agricultural (irrigation) uses are co-riparians. In other words, one use does not have priority over the others.

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Reasonable Use Rule

In Michigan the reasonable use rule is applied to all water rights. The principle of reasonable use was first stated in the case of Dumont V. Kellogg in 1874. In this case the court rejected the contention that the priority of appropriation of water gave superior rights and established reasonable use as the applicable rule to the establishment of water rights. In the words of the court the most important criterion in determining what is reasonable use is a consideration of "the general usage of the country in similar cases". In other words, the definition of reasonable use is established on a case by case basis by the court.

Along with the reasonable use rule the correlative rights principle states that in addition to being reasonable, use during times of shortage must be prorated among riparians. This principle defines municipal, recreational, industrial and agricultural uses as co-riparians, thus all have an equal right to the use of the available water.

The case of Hoover V. Crane in 1958 is a good example of both of the above principles. In this case a fruit farmer (Crane) found himself in court trying to explain why his use of water for irrigation was reasonable. The suit was brought against Crane by his neighbors, a group of cottage owners headed by Hoover, when Crane began irrigating from Hutch Lake in Allegan County.

Crane owned 180 acres of land which bordered on Hutch Lake and he was thus a riparian entitled to the use of water. The year 1958 was a very dry one and Crane decided to irrigate 50 acres of pear trees on his land. During the month of August, due to irrigation pumpage and evaporation, the lake level fell six to eight inches. This caused the lake waterline to recede by 50 to 60 feet impeding boating and swimming on the lake. It was at this time that the cottagers headed by Hoover set out to prevent Crane from further water use for irrigation.

The State Circuit Court in its decision held that when the lake was low enough so that it no longer drained into an outlet, the farmer was entitled to use no more than a metered one quarter inch from the area of the lake. Furthermore the court held that the case would be held open for future petitions based upon changing conditions.

The cottage owners were not satisfied with this limitation and sought further redress in the Michigan Supreme Court. The Supreme Court then decided to uphold the Circuit Court ruling stating that the cottage owners led by Hoover were entitled to no more protection than given by the original decree.

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In Hoover V. Crane both the reasonable use rule and the correlative rights principle were applied. In addition the courts held the case open for future petitions based upon changing conditions. A simple definition of reasonable use for Michigan riparian rights might be "will keep your neighbors out of court". This definition, though a bit simplistic, is intended as a forewarning to potential irrigators that some accommodation of neighbor interest may be necessary.

SEVERANCE RULE

The severance rule is probably the easiest understood, yet possibly the most often violated aspect of the riparian doctrine in Michigan. Since 1837, when Michigan became a state, the severance rule of the riparian doctrine has been in force. Simply put, the severance rule states that, once a tract of riparian land is subdivided into smaller parcels, the riparian rights previously attached to parcels no longer bordering the lake or stream are lost forever. Of course the riparian rights of the parcels still bordering the lake or stream remain unchanged.

The statement above that riparian rights "are lost forever" should not be taken lightly, because under no circumstances can they be reestablished. This means that if one of the several parcels without riparian rights is reunited with a parcel still holding riparian rights the previously existing riparian rights cannot be reestablished on the severed parcel.

For example, suppose a 200 acre tract of land along a stream is subdivided into 8-50 acre parcels as shown in Figure 1.

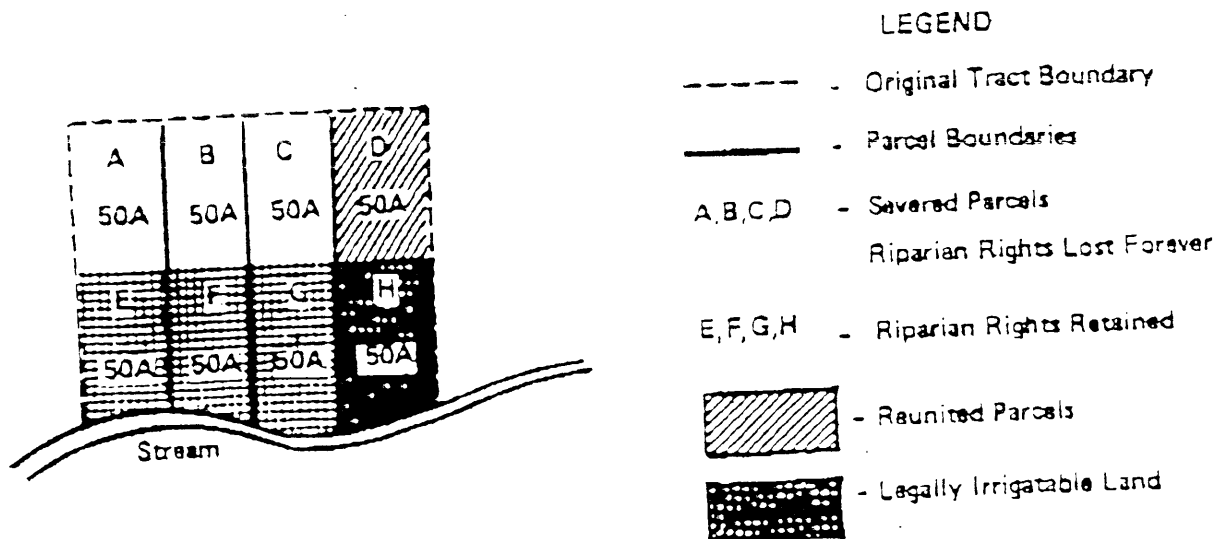


Figure 1. Example of the severance rule.

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In this case parcels A, B, C and D have lost their riparian rights forever in accordance with the severance rule. Parcels E, F, G and H will retain their riparian rights because they still border the stream. If a third party later purchases parcels D and H the riparian rights previously attached to parcel D are not reestablished. Thus if the new owner wishes to irrigate his land with water from the stream he would only have the legal right to irrigate parcel H. The use of stream water on parcel D would consist of using riparian water on non-riparian land an "adverse use" thus violate the riparian doctrine.

As indicated above the severance rule is one of the easiest rules associated with the riparian doctrine to violate. However, it is also one of the easiest ways of seeking an injunction against irrigation water use. An important legal axiom is that "ignorance of the law is not a legal defense". If this rule makes some readers a bit uneasy it was intended to do so. In addition perhaps this section will stimulate new irrigators to research land ownership and water rights before investing in irrigation.

OTHER APPLICABLE LAWS

In the 1970's a new category of statutes and acts emerged which effected potential irrigators. Broadly defined these laws could be classified as Environmental Laws. Included in this group are the Michigan Environmental Protection Act (Public Act 127 of 1970), the Michigan Natural Rivers Act (Public Act 231 of 1970), the Inland Lakes and Streams Act (Public Act 346 of 1972), and the Soil Erosion and Sedimentation Act (Public Act 347 of 1972).

Briefly, the Environmental Protection Act of 1970 states that anyone who has or is likely to pollute, impair or destroy a resource is in violation of the law. Irrigators, it could be said, are interfering with the natural flow required by wildlife and fish, and thus could be subject to lawsuits based upon this act. In addition to the unusual downstream riparians this act broadens the definition of injury in such a way as to give legal standing to all possible users and enjoyers of a resource. In other words individuals who are not actually injured but are users and enjoyers of the resource may bring a lawsuit against the offending party.

The Natural Rivers Act of 1970 has presently designated twelve Michigan rivers as "wildlife", "wild scenic" or "country scenic". Water withdrawal from these rivers for irrigation requires permission from the Michigan Department of Natural Resources (DNR). The major constraint to water use from streams which are part of a natural river area is that the use must be in accordance with the long range comprehensive plan for the stream. The long range plan for an individual natural river area is adopted by local land holders in cooperation with the state for

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the purpose of preserving and enhancing the value of the stream for water conservation, fish, wildlife, boating, scenic, aesthetic, flood protection, ecologic, historic, and recreational uses. Questions regarding permits and the designation of rivers under this Act are referred to the Division of Land Resource Programs, Michigan DNR.

The Inland Lakes and Streams Act of 1972 was written to protect the public trust in inland lakes and streams. For irrigators this act is of interest primarily when construction below the "ordinary high water" mark is required. An example of this could be the construction of a permanent intake structure for an irrigation pumping station. In this case a permit from the DNR is required. For those interested in determining the ordinary high water mark on their property, the DNR will assist interested riparians in establishing this point on their property for a fee of \$50. Questions related to this act are referred to the Division of Land Resource Programs, Michigan DNR.

The Soil Erosion and Sedimentation Act of 1972 provides for control of soil erosion and the protection of state waters from sedimentation. For irrigators this act is primarily of concern where major construction and earth moving is required within 500 feet of an inland lake or stream. When this type of construction is anticipated a permit should be obtained from the DNR. Questions related to this act are referred to the Division of Land Resource Programs, Michigan DNR.

Another act which can affect potential irrigators is the Dam Act of 1963. This act needs to be considered when impounding a stream or waterway. Specifically this act applies when the impoundment results in a storage reservoir with 5 feet of head or a surface area of 5 acres. In this case the irrigator is required to seek a permit from the Division of Land Resource Programs of the DNR and in some cases the County Board of Commissioners. If an irrigator impounds or diverts water from a county drain, this practice would require consideration of the Michigan Drain Code and approval of the Drain Commissioner. In 1982 there was an attempt by the state legislature to include irrigation under the Drain Code of Michigan. At present however, this is not the case.

In summary each of the above acts has some affect on the use of surface water for irrigation and each should be considered before an investment in irrigation is made.

Ground Water and Wells

From a legal stand point probably the safest source of water for irrigation is from a drilled well. Fresh ground water can be obtained in most areas of Michigan by accessing one of the numerous water-bearing glacial drift and rock formations

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(aquifers) beneath the earths surface. The rules, doctrines and regulations which apply to the extraction of ground water include ; the English common law rule, the correlative rights doctrine and the Ground Water Quality Control Act (Public Act 294 of 1965 as amended, and rules).

The English common law rule when applied to ground water rights depends upon case law for establishment of those rights. In essence the rule states that ownership of all ground water beneath a parcel of land is absolute. The rule of absolute ownership has been argued in court often, particularly with respect to excessive pumping. The result of these cases in most states has been the application of the correlative rights and reasonable use doctrines to ground water. In Michigan because of a generally plentiful supply of ground water there are very few cases which would assist potential irrigators in determining their rights.

In general the use of ground water on the property from which it was removed has been preferred to use of the ground water at another location. This is similar to the notion of using riparian water on nonriparian land. Transportation of water is not prohibited and thus many Michigan municipalities use water from ground water wells for distribution to users which are non-right-holders. When municipal pumping clearly affects the ground water level of nearby property owners, the courts have usually held that the public benefit was superior to the private rights. In these cases the courts also granted damages to the injured parties. Thus if a neighbor complains that your irrigation pumping is causing their well to go dry, a prudent response would be to offer to deepen their well and consider it an irrigation expense.

The Ground Water Quality Control Act of 1965 was written to protect the public health by regulating the drilling of water wells. For the most part the rules and regulations established by this act apply to well drillers. A potential irrigator should check to see if a County and/or Township Permit is required and then contact a registered well driller for installation of an appropriate sized irrigation well. For further information regarding the Ground Water Quality Control Act of 1965 readers are referred to the Michigan Department of Public Health.

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Common Questions and Answers

1. Q: Do irrigators need a permit to divert water from a stream or lake passing through their property?

A: Briefly, no, but beware that Public Act 231 of 1970, the Natural Rivers Act, designated twelve rivers in the state as "wildlife", "wild scenic", or "country scenic" and permission from the Department of Natural Resources is required for their use in irrigation. Also remember that you only have a right to reasonable use. Your downstream neighbors are co-riparians and have an equal right the use and enjoyment of the water flowing in the stream.

2. Q: Who defines "reasonable use" of water?

A: Under the riparian doctrine the court decides what is reasonable and unreasonable based upon the particulars of the case before it.

3. Q: How close to the lake or stream can an irrigator install a pumping platform?

A: A permit is required for construction of any permanent structures or temporary excavations below the ordinary high water mark. Above this point construction is at the discretion of the irrigator.

4. Q: If an irrigator was first in using the stream water doesn't that make that irrigator first in the right to use the water in the future?

A: The answer is no. In Michigan the riparian doctrine of reasonable use is followed. The "first in use, first in right" or appropriation doctrine is followed in many western states. In many of those states a permit system is also common.

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5. Q: - Can a farmer irrigate land which is adjacent to but not actually bordering the stream or lake if he gets permission from the riparian land owners nearby?

A: The answer to this question is absolutely not. In the first place it is illegal to use riparian water on non-riparian land. In the second place the rights to use riparian water are non transferable.

6. Q: If we have an exceedingly dry year and the natural flow in a stream is less than normal, who has the rights to the remaining water?

A: In Michigan the principle of correlative rights is usually applied. This approach seeks equity among riparian users by prorating the available water supply.

7. Q: Can non-riparians seek a court injunction against water use for irrigation by an established riparian?

A: The answer is both yes and no. By the riparian doctrine the non-riparian would not have legal standing in a court of law. However, if the injunction is sought under PA-127 or if the required permits were not obtained, the court would hear the case.

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Definition of Terms

adverse use - a use which is contrary or in violation of a specific doctrine.

appropriation doctrine - the doctrine of water use where the "first in use is the first in right".

correlative doctrine - states that in time of shortage the available water must be prorated among the riparians.

diffuse water - water with no definitive pattern but found on the surface run off and often only transient.

ground water - water which occurs as flowing water in subterranean channels or as diffuse percolated water.

lakes and ponds - definitive pattern or shape of natural water on the surface of the land without movement.

ordinary high water mark --the line between upland and bottom land which persists through successive changes in water level.

prescriptive rights - water rights acquired through open and adverse use over time, not usually associated with the riparian doctrine.

property - the exclusive right to control an economic good.

riparian doctrine - water rights based upon land ownership bordering the lake or stream.

reasonable use - the definition of reasonable use is established by the court on a case-by-case basis.

stream - water on the surface of the land flowing in a channel with distinguishable banks (sides).

severance - an aspect of the riparian doctrine which states that once a parcel of land is severed from the main tract of land with riparian rights it loses those rights permanently.